INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	7
Conclusion	11

CITATIONS

Cases:

Escobedo v. *Illinois*, 378 U.S. 478	10
Malloy v. *Hogan*, 378 U.S. 1	8
People v. *Steuding*, 6 N.Y. 2d 214	8
United States v. *Benjamin*, 120 F. 2d 521	8
United States v. *Cleary*, 265 F. 2d 459, certiorari denied, 360 U.S. 936	7
United States v. *Garnes*, 258 F. 2d 530, certiorari denied, 359 U.S. 937	8
United States v. *Klein*, 247 F. 2d 908, certiorari denied, 355 U.S. 924	8
United States v. *Orta*, 253 F. 2d 312, certiorari denied, 357 U.S. 905	11
United States v. *Pappadio*, 346 F. 2d 5, pending on petition for a writ of certiorari, No. 442, Oct. Term, 1965	8
United States v. *Parker*, 244 F. 2d 943, certiorari denied, 355 U.S. 836	8, 11
United States v. *Remington*, 208 F. 3d 567, certiorari denied, 347 U.S. 913	11
United States v. *Scully*, 225 F. 2d 113, certiorari denied, 350 U.S. 897	8
United States v. *Williams*, 341 U.S. 58	11

788-404—65——1

Cases—Continued

Constitution and statutes:

	Page
U.S. Constitution:	
Fifth Amendment	7
Sixth Amendment	9
18 U.S.C. 1621	2
18 U.S.C. 3651	2

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 503

HYMAN WINTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (2 R. 12–25;[1] Pet. App. 19–33) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1965 (2 R. 26), and petitions for rehearing (2 R. 28–34), and for rehearing *en banc* (2 R. 30, 33), were denied on August 2, 1965 (2 R. 38, 42; Pet.

[1] The printed record, consisting of the parties' appendices to their briefs in the court of appeals, is in two volumes, to which we shall refer as "1 R." and "2 R." The proceedings in the court of appeals are appended to volume 2 and consecutively paginated therewith.

App. 34). The petition for a writ of certiorari was filed on August 27, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether one who is a subject of a grand jury's inquiry, and against whom incriminatory evidence has been received, may be subpoenaed to testify before the grand jury.

2. Whether such a witness is constitutionally entitled to be advised of his right to consult with counsel before testifying.

3. Whether the prosecutor's failure to advise the grand jury witness of his right to counsel is a valid defense to a perjury charge for false testimony in the grand jury room.

STATEMENT

Count 5 of a five-count indictment, filed June 26, 1963, in the United States District Court for the Eastern District of New York, charged that petitioner committed perjury before a federal grand jury, in violation of 18 U.S.C. 1621 (1 R. 1, 7–10).[2] Following a trial by jury, petitioner was found guilty and sentenced to two years' imprisonment (1 R. 69). Execution of the final 21 months of the sentence was suspended, and petitioner was placed on probation with respect to that portion of the sentence, in accordance with the provisions of 18 U.S.C. 3651 (1 R.

[2] Counts 2, 3, and 4 were dismissed as duplicitous at the close of the government's case (1 R. 20). Count 1 was dismissed at the close of the entire case (1 R. 40–41). These four counts charged other instances of perjury before the same grand jury.

69–70). The court of appeals affirmed (2 R. 12–26; Pet. App. 19–33).

1. The evidence adduced by the government may be summarized as follows:

In December 1962, a federal grand jury in and for the Eastern District of New York began an extensive investigation into bribery, graft, and other corrupt practices involving employees of the Federal Housing Administration and local builders (1 R. 11–12). On May 8, 1963, petitioner, a supervisor of construction inspectors for the FHA, appearing before the grand jury pursuant to subpoena, categorically denied that he had ever taken money, for any reason whatever, from any builder (the allegedly false testimony forming the basis of count 5) (1 R. 11, 21; 2 R. 3–4, 5–11). Seven builders testified at petitioner's trial that they had given money to petitioner, in various amounts and for various asserted purposes, during the period 1958–1962 (*e.g.*, 1 R. 15–18).

2. Prior to petitioner's appearance before the grand jury, approximately fifty builders, all of whom stated that they knew petitioner, had appeared and testified. All but six of these denied that they had ever given petitioner money. These six acknowledged having made money payments to him, though some said that the payments were not made to influence his official action, but were more in the nature of gratuities (1 R. 12–14; Pet. App. 21; cf. 1 R. 15–18). The grand jury subpoenaed petitioner because it wished to hear his statement as to whether the testimony of the build-

ers who had named him as the recipient of payments "was true or not" (1 R. 13–14).[3]

Immediately prior to his grand jury appearance, petitioner appeared before the Assistant United States Attorney in charge of the investigation, who informed him that he was the subject of the grand jury's inquiry, told him what the inquiry was about, and advised him of his privilege against self-incrimination (2 R. 1–2, 3). The Assistant presented him with a "waiver of immunity" form, which petitioner read, acknowledged he understood, and agreed to execute (2 R. 2–3). In reply to the Assistant's question, whether he had ever accepted any bribes from builders, petitioner denied that he had ever taken "a crooked penny in [his] life" (1 R. 22, 28–29). He then went before the grand jury, as petitioner himself testified, "to answer questions about myself and about bribes" (1 R. 23).

In the presence of the grand jury, the Assistant United States Attorney again told petitioner that he was the subject of an investigation by the grand jury into his conduct as an employee of the Federal Hous-

---

[3] The foreman of the grand jury testified on cross-examination at the trial (1 R. 13–14):

"Q. And isn't it a fact, sir, at that time you were contemplating the filing of an indictment against Mr. Winter prior to his appearance? A. No, we were not.

"Q. You had heard the testimony of the builders and you had not contemplated an indictment at that time? A. No, because we were going to call him——

"Q. Based on that testimony? A. (Continuing)——and let him answer and find out whether it was true or not.

"Q. In other words, you were waiting to hear from Mr. Winter what he was going to say? A. That is correct."

ing Administration, and again advised him of his right against self-incrimination (2 R. 1–2). "I wish to further advise you," said the Assistant, in explaining this privilege (*ibid.*),

> that you are a prospective defendant and that anything that you might say before the Grand Jury could be used against you at a later proceeding or proceedings. * * * You need not testify as to those matters which may tend to incriminate you, that is to say, you cannot be compelled to testify against yourself, as provided in the Fifth Amendment to the United States Constitution. * * * This is not to say, however, that you cannot testify before the Federal Grand Jury if you desire to do so. * * * Nor is it to say that you can refuse to testify as to matters that would incriminate others than yourself. * * * But, as I have already stated to you, if the matters you would testify to would tend to incriminate yourself as well as others, you can refuse to testify and can assert your rights under the Fifth Amendment of the United States Constitution. * * *

Following each portion of the foregoing instructions, petitioner was asked by the Assistant if he "underst[ood]" and petitioner acknowledged that he did (2 R. 2). He was thereupon again presented with the "waiver of immunity" form, which petitioner signed—after again reading and acknowledging that he understood it (2 R. 2–3).[4]

---

[4] The "waiver" read: "I, Hyman Winter, do hereby voluntarily consent to appear and testify in the above entitled cause presently under investigation before the Grand Jurors of the United States of America within and for the Eastern District of New York and do hereby voluntarily waive im-

Petitioner then proceeded to testify, at no time asserting his privilege against self-incrimination (2 R. 3–11). He was shown a list of the builders who had testified they knew him, which included the six who had sworn they had given him money at various times (2 R. 5–6; Pet. App. 22). After acknowledging that he knew most of the builders on the list (2 R. 5–6), he denied that he had received money from anyone on the list or from any other builder, either as a gratuity or for the purpose of influencing his official decisions or actions (2 R. 7–8). Asked whether any builder on the list bore such a grievance against him as might cause him to bear false witness against him, petitioner stated that, except as to one, whom he named, none had such a motive to his knowledge (2 R. 8–9). In response to the question underlying the fifth count of the indictment, he denied that he had ever accepted money from any builder, for any reason whatever (2 R. 11).

Petitioner testified at his trial—and there was no contradictory evidence—that neither the Assistant United States Attorney nor the foreman of the grand jury advised him at the time of his appearance before the jury that he had a right to consult with an attorney before testifying (1 R. 22, 23, 28).

Six weeks after petitioner's testimony before the grand jury and nearly seven months after commence-

---

munity from prosecution for any offense of mine which shall be disclosed or indicated by me for so appearing and testifying or by any testimony which I may give or by any testimony or names that I may make in the presence of said Grand Jurors."

ment of the inquiry, the grand jury returned bribery indictments against a number of FHA employees, including petitioner, and perjury indictments against petitioner and one Wallen, a builder who had once accused petitioner but then sought to retract the charge. With respect to petitioner, the government proceeded to trial only as to the perjury indictment, obtaining the conviction which is involved here (Pet. App. 23).

ARGUMENT

1. At the time petitioner was summoned to appear before the grand jury, that body had heard testimony by six builders that they had given him money on various occasions. Since this testimony tended to implicate him in an offense or offenses within the scope of the grand jury's investigation, petitioner contends that it was a violation of his privilege against self-incrimination for the grand jury to have subpoenaed him to appear before it at all (Pet. 13–16). The contention is unsound.

The Fifth Amendment's prohibition against compulsory self-incrimination has never been deemed to preclude a grand jury from subpoenaing one who, on the basis of other witnesses' testimony, may appear to have committed an offense germane to the jury's inquiry. Subject to the right of the witness to assert his privilege against self-incrimination in response to specific questions, a grand jury is not prohibited from making pertinent inquiries of one who, being himself a subject of the investigation, is a potential defendant. *United States* v. *Cleary*, 265 F. 2d 459 (C.A. 2), certiorari denied, 360 U.S. 936; *United*

States v. *Klein*, 247 F. 2d 908, 920–921 (C.A. 2), certiorari denied, 355 U.S. 924; *United States* v. *Scully*, 225 F. 2d 113 (C.A. 2), certiorari denied, 350 U.S. 897; *United States* v. *Benjamin*, 120 F. 2d 521, 522 (C.A. 2). See, also, *United States* v. *Pappadio*, 346 F. 2d 5, 8–9 (C.A. 2), pending on petition for a writ of certiorari, No. 442, Oct. Term, 1965; *United States* v. *Garnes*, 258 F. 2d 530, 534 (C.A. 2), certiorari denied, 359 U.S. 937; *United States* v. *Parker*, 244 F. 2d 943 (C.A. 7), certiorari denied, 355 U.S. 836. Cf. *Malloy* v. *Hogan*, 378 U.S. 1, 11–14 (by implication).[5]

"To suggest," as the court of appeals here observed, "that once an individual is named by witnesses before a grand jury under circumstances which may lead to his indictment he thereby automatically gains immunity from subpoena would denude that ancient body of a substantial right of inquiry" (Pet. App. 25). This grand jury—as the court below went on to point out, see Pet. App. 25–26—was engaged in a broad investigation of alleged bribery and corruption of FHA officials. It had the right and indeed the duty to follow leads wherever they pointed, to determine whether bribery or other illegal practices had been engaged in and, if so, what builders and officials were involved. The grand jury was not bound to accept at face value the testimony of the

[5] Insofar as New York may follow a rule more restrictive of grand juries' freedom of inquiry in this regard (see cases cited in the opinion below at Pet. App. 24, n. 5), it is sufficient to note that, as the New York decisions themselves have stressed, "it is solely the Constitution of New York" with which the New York courts have been concerned. *People* v. *Steuding*, 6 N.Y. 2d 214, 216 (1959).

six builders who had given incriminatory testimony against petitioner, and the evidence indicates that when petitioner was subpoenaed the grand jury had not yet decided to indict him. See note 3, *supra*. As the foreman testified at the trial, the grand jurors wanted to hear petitioner's statement as to whether the testimony of the builders who had implicated him "was true or not." Petitioner might well have persuaded the grand jury that the testimony of the builders was false or that it furnished an otherwise inadequate basis upon which to return a true bill.

2. Nor is there merit to petitioner's claim (Pet. 6–11) that the failure of the Assistant United States Attorney to advise him of his right to consult an attorney in connection with his appearance before the grand jury deprived him of his right under the Sixth Amendment to the "assistance of counsel for his defence." Petitioner was not an "accused" at the time of his grand jury appearance—certainly not in any usual or traditional sense of the term—and the proceeding before the grand jury was not a trial. The grand jury, as we have noted, had not decided to indict petitioner as of the time when it summoned him, nor had it otherwise marked him for prosecution. As its foreman testified, it simply wished to hear what petitioner had to say about the matters testified to by other witnesses. The obtaining of petitioner's testimony was properly viewed by the grand jury as a normal further step in its wide-ranging inquiry, and petitioner was fully advised concerning his privilege not to incriminate himself.

Escobedo v. *Illinois*, 378 U.S. 478, relied on by petitioner (Pet. 6, 7–8, 9, 10, 12–13, 15), is clearly distinguishable. That case involved the admissibility of a murder suspect's incriminating admission, made while in the custody of police officers during a process of interrogation designed to elicit such admissions. The accused not only had not been advised of his right to remain silent, but he had requested and been denied an opportunity to consult with his retained attorney. The Court, in summarizing the decision's holding (378 U.S. at 490–491), referred explicitly to each of these elements—none of which has a parallel in the present case.

3. The court of appeals was at all events correct, we submit, in concluding that even if petitioner were entitled, as a matter of constitutional right, to be advised that he could consult with counsel prior to testifying before the grand jury, the Assistant United States Attorney's failure so to advise him was no defense to a charge that he thereafter perjured himself in the grand jury room (Pet. App. 27–30). The court observed (Pet. App. 27–28),

> It is one thing to say that testimony compelled from a grand jury witness who has been denied his right to counsel may not be used to secure his indictment or conviction either for the crimes being investigated or for those revealed during the course of his testimony. Exclusion of such testimony does not preclude reindictment and prosecution on the basis of untainted evidence, thus affording an opportunity to vindicate the public interest. [Footnote omitted.] It is an entirely different prop-

> osition, however, to say that such a witness may with absolute impunity proceed to perjure himself in the hope of avoiding the return of a True Bill. Such a rule would degrade the oath and have the effect of conferring permanent immunity on the perjurer.

Cf. *United States* v. *Parker,* 244 F. 2d 943, 945–949 (C.A. 7), certiorari denied, 355 U.S. 836 (failure to warn a grand jury witness of his privilege against self-incrimination does not bar a perjury prosecution for false testimony before that body); *United States* v. *Orta,* 253 F. 2d 312 (C.A. 5), certiorari denied, 357 U.S. 905 (same). And see *United States* v. *Williams,* 341 U.S. 58, 65–69 (false testimony is punishable as perjury though committed during trial of defective indictment); *United States* v. *Remington,* 208 F. 2d 567 (C.A. 2), certiorari denied, 347 U.S. 913 (same).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
PHILIP R. MONAHAN,
Attorney.

SEPTEMBER 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965